DEPARTMENT OF CORPORATIONS.

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LYONS-THOMAS HARDWARE COMPANY *v.* READING HARDWARE COMPANY. COURT OF CIVIL APPEALS OF TEXAS.[2]

Corporation—Right to Transact Business in Foreign States—Constitutional Law—Interstate Commerce.

Where a corporation chartered and doing business in another State sold goods in Texas, to be transferred and delivered to a person doing business there, an action for the price cannot be defeated on the ground of the company's failure to comply with the statute requiring a foreign corporation to file a copy of its articles with the Secretary of State of Texas, since the transaction was an act of interstate commerce, and even if the statute could be held applicable it would violate the commerce clause of the Federal Constitution: Bateman *v.* Western Star Milling Co., 20 S. W. Rep., 931, followed.

Opinion by TARLTON, J.

THE RIGHT OF A NON-RESIDENT TO TRANSACT BUSINESS IN A STATE.

The clauses of the National Constitution which are usually invoked to sustain this right are Article 1, § 8, giving to Congress the right to regulate commerce among the several States, Article 4, § 2, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, Article 1, § 10, forbidding any State without the consent of Congress to lay duties on imports or exports, or to lay any duty of tonnage, and § 1 of the Fourteenth Amendment, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

In Ward *v.* State of Maryland, 12 Wall., 418, the plaintiff in error was indicted in the Criminal Court of Baltimore for violating a statute of Maryland by selling by sample in the city of Baltimore certain articles of merchandise without obtaining a license so to do. By the laws of Maryland, persons not permanent residents in the State

[1] Owing to the absence of Mr. Freedley, the editors alone are responsible for this annotation.

[2] Reported in 21 S. W. Rep., 300.

were prohibited from offering for sale within a certain district of the State any goods whatever other than agricultural products and articles manufactured in the State, either by card, sample or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do. Licenses might be granted by the proper authorities of the State for that purpose on the payment of $300, to run for one year from date. The case came before the Court upon an agreed statement of facts, showing a violation of the statute by the defendant below, and that he was at the time of the commission of the offense and up to the trial a citizen of the United States and of the State of New Jersey and resident in said State. The facts so agreed raised the single question whether the Maryland statute was invalid for repugnancy to the Constitution of the United States. In the opinion of the Court reference was made to the limitations on the power of the several States to levy taxes and also to the restraint imposed by the commerce clause of the Constitution, but the decision rested on the point that the statute under consideration was repugnant to the second section of Article 4 of the Constitution, Mr. Justice CLIFFORD saying: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the Court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens: Cooley, Const. Lim., 16; Brown *v.* Maryland, 12 Wheat., 449."

In Robbins *v.* Taxing District of Shelby County, 120 U. S., 489, the constitutionality of a Tennessee statute, also directed against foreign drummers, was passed upon by the Court. Evidently, with the intent to avoid the objection raised against the constitutionality of the Maryland statute, this provided that "All drummers and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the county," etc. The Court, however, held the statute to be unconstitutional, as offending against the commerce clause, declaring that a State cannot levy a tax or impose any other restriction upon the inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein; that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce; that such commerce is not subject to State taxation, even though there be no distinction between it and domestic commerce. A like ruling was made in the State of

Minnesota *v.* Barber, 136 U. S., 312, where an attempt was made to put a tax on the products of other States by statute requiring as a condition of sales in Minnesota of fresh beef, veal, lamb or pork for human food, that the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered, the Court saying, that "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

THE RIGHT OF A FOREIGN CORPORATION TO TRANSACT BUSINESS IN A STATE.—Such being the safeguards which insure to a citizen of the United States the right to carry on business in the various States of which he is not a resident, we shall now consider whether any such rights are given to a foreign corporation. In the celebrated case of Paul *v.* Virginia, 8 Wall., 168, it was held that corporations are not "citizens" within the meaning of Article 4, § 2 of the National Constitution, declaring that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and this has been followed in the more recent case of Pembina C. S. M. & N. Co. *v.* Penna., 125 U. S., 181.

That case upheld the constitutionality of an Act of Assembly of the State of Pennsylvania providing that no foreign corporation, except foreign insurance companies, which did not invest and use its capital in that commonwealth, should have an office therein for the use of its officers, stockholders, agents or employees, unless it should first obtain a license so to do, for which it was required to pay to the State Treasurer annually one-quarter of a mill on the dollar of capital stock which it was authorized to have. The plaintiff in error was incorporated under the laws of Colorado for the purpose of carrying on a general mining and milling business in that State, where it had its principal office. During the year 1881 it occupied an office in the city of Philadelphia for the use of its officers, stockholders, agents and employees, and was assessed for office license under the act above recited by the Auditor-General of Pennsylvania. In its opinion the Court said: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by State authority."

While it was laid down as law in Sante Clara Co. *v.* Southern Pacific Railway, 118 U. S., 394, that the provision of the Fourteenth Amendment of the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the law, applies to corporations, yet, in Phila. Fire Association *v.* New York, 119 U. S., 110, it was held that this provision does not prohibit a State from imposing such conditions upon foreign corporations as it may choose as a condition of their admission within

its limits, and that they cannot be of right within such jurisdiction until they receive the consent of the State to their entrance therein. In so deciding, however, the court was careful to add that it was not to be implied from what was there said, "that the power of a State to exclude a foreign corporation from doing business within its limits, is to be regarded as extending to an interference with the transaction of commerce between that State and other States by a corporation created by one of such other States."

The suggestion there thrown out, that corporations are within the protection of the commerce clause of the Constitution, had before been asserted in Gloucester Ferry Co. *v.* Pa., 114 U. S., 196, and was afterward exemplified in the cases of McCaull *v.* California, 136 U. S., 104; N. W. Ry. Co. *v.* Penna., 136 U. S., 114, and Crutcher *v.* Kentucky, 141 U. S., 47. In the last-mentioned case it was held that a State law which forbids a corporation of another State from carrying on its business of interstate commerce within the State without taking out a license and paying a license fee to the State is not an exercise of the police power of the State which is permissible as against the power of Congress to regulate interstate commerce. Neither licenses nor indirect taxation of any kind, nor any system of State regulation can be imposed upon interstate any more than foreign commerce. It must, however, be borne in mind that the language used by the court is predicated of foreign corporations engaged in the business of transportation between different States, Mr. Justice BRADLEY, who delivered the opinion, saying: "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations and all other corporations whose business is of a local and domestic nature, which would include express companies, whose business is confined to points and places wholly within the State. The cases to this effect are numerous: Bank of Augusta *v.* Earle, 38 U. S., 13 Pet. 519; Paul *v.* Virginia, 75 U. S., 8 Wall., 168; Liverpool Ins. Co. *v.* Massachusetts, 77 U. S., 10 Wall., 566; Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727; Phila. F. Asso. *v.* New York, 119 U. S., 110." To which list of cases may be added the recent decision in Horn Silver Mining Co. *v.* State of New York, 143 U. S., 314, where the court says that this power of a State to exclude foreign corporations or to impose conditions upon which it permits them to do business within its limits is a doctrine "so frequently declared by this court that it must be deemed no longer a matter of discussion if any question can ever be considered at rest. Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered since the judgment of this court was announced more than a half century ago in Bank of Augusta *v.* Earle, 38 U. S., 13 Pet., 519.

One of these qualifications is that the State cannot exclude from its

limits a corporation engaged in the interstate or foreign commerce established by the decision in Pensacola Teleg. Co. *v.* Western U. Teleg. Co., 96 U. S., 1, 12. The other limitation on the power of the State is where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice BRADLEY, in Stockton *v.* Baltimore & N. Y. R. R. Co., 32 Fed. Rep., 9, 14. As that learned Justice said: "If Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union." And this court, in citing this passage, added, "without the permission and against the prohibition of the State:" Pembina Con. S. Min. & Mill. Co. *v.* Penna., 125 U. S., 181, 186."

Can it then be said that under the decisions of the Supreme Court of the United States a foreign corporation is entitled to the same freedom in carrying on interstate commerce as citizens of the several States? Or, to put it in another way, has the exact point decided in the case at the head of this note been passed on by the Supreme Court of the United States? This question cannot be answered unqualifiedly in the affirmative, although such a holding would seem to be a logical necessity from what has been explicitly decided. As far back as 1884, in the case of Gloucester Ferry Co. *v.* Penna., 114 U. S., 198, the Court, speaking by Mr. Justice FIELD, said: "Nor does it make any difference whether such commerce is carried on by individuals or by corporations: Welton *v.* Missouri, 91 U. S., 275; Mobile Co. *v.* Kimball, 102 U. S., 691. As was said in Paul *v.* Virginia, at the time of the formation of the Constitution, a large portion of the commerce of the world was carried on by corporations; and the East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world: 8 Wall, 168. The grant of power is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or by corporations. At the present day nearly all enterprises of a commercial character requiring for their successful management large expenditures of money are conducted by corporations. The usual means of transportation on the public waters where expedition is desired are vessels propelled by steam; and the ownership of a line of such vessels generally requires an expenditure exceeding the resources of single individuals. Except in rare instances, it is only by associated capital furnished by persons united in corporations, that the requisite means are provided for such expenditures."

This language was quoted with approval in the subsequent case of P. C. S. M. S. Co. *v.* Penna., 122 U. S., 326.

The question then would seem to resolve itself into the determination of whether the negotiation of the sale of goods which are in another State by a foreign corporation, for the purpose of introducing

them into the State in which the negotiation is made, is an act of interstate commerce. We have already seen, in the decisions of Ward *v.* Maryland, and Robbins *v.* Taxing District of Shelby County, *supra*, that when such acts are done by individuals they are held to constitute interstate commerce, and it is difficult to understand how their character could change in this respect merely because the vendor in one case was an individual and in the other a corporation. Nevertheless, it should be borne in mind that in those cases in which a corporation has been held to be within the protection of the commerce clause, such corporation has been actually engaged in the transportation of messages, goods or passengers between two or more of the States, and in the case of Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727, while two of the court put themselves on record as entertaining the views set forth in the case at the head of this note, yet the majority of the court, not finding it necessary to base their decision on that point, declined to express any opinion on the question we are here considering. The facts in that case were as follows: The Act of the legislature of Colorado provided that foreign corporations should file certain certificates with the secretary of State as a condition precedent to their doing business therein, and that a failure to comply therewith should render the officers, agents or stockholders of such corporations individually liable on all its contracts made while the corporation was so in default. These provisions of the law of Colorado being in force, the plaintiff in error, which was a corporation organized under the laws of Ohio, and having its principal place of business in that State, entered into a contract within the State of Colorado with defendants, who are citizens thereof, by which it agreed to sell and deliver to them a steam engine and other machinery for a stipulated price. Suit was brought by plaintiff to recover damages for breach of said contract. The defendants, among other defences, pleaded that when the contract was entered into the plaintiff had not made and filed the certificate required by the Act aforesaid. To this answer plaintiff demurred. The demurrer was overruled by a divided court, and the plaintiff electing to stand by its demurrer, judgment was entered against it, dismissing its suit and for costs, which judgment was brought under review by the writ of error in the case. From the brief of counsel it may be inferred that the unconstitutionality of the Act, as offending against the commerce clause, was not urged by the plaintiff in error, though touched on in the opinion of the Court, the contention being that the provisions of the Act in question applied only to corporations of other States which came to Colorado with the intention of carrying on the business for which they were incorporated, that any other interpretation would prevent single transactions between foreign corporations and a citizen, and that the performance of a single isolated act, such as making of a single contract, does not constitute doing business within the State within the meaning of such legal provisions as that of the Act under consideration. This was also the view taken by the majority of the court, Mr. Justice WOODS, who

delivered this opinion, saying: "We base the conclusion that the demurrer to the defendant's answer should have been sustained upon the interpretation we have given to the Constitution and statute, and do not find it necessary to decide whether their provisions invade the exclusive right of Congress to regulate commerce among the several States. We have examined all the cases cited by the defendants to support their interpretation. In none of them was the statute construed similar in its language or provisions to the Constitution or statute under consideration, and the cases can have no controlling weight in the present controversy."

Mr. Justice MATTHEWS and Mr. Justice BLATCHFORD, however, while concurring in the judgment of the Court, took the ground that whatever might be the construction of the statute, the transaction in question was an act of interstate commerce, and that the State had no power to prohibit a foreign corporation from selling in Colorado by contract made there its machinery manufactured elsewhere. Their opinion reads as follows:

"Mr. Justice MATTHEWS: Mr. Justice BLATCHFORD and myself concur in the judgment of the Court announced in this case, but on different grounds from those stated in the opinion.

"Whatever power may be conceded to a State to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the States, for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress.

"In the present case the construction claimed for the Constitution of Colorado, and the statute of that State passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another State, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce, and to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that State, and to prohibit it from carrying on within that State its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States.

"In Paul *v.* Virginia, 8 Wall., 168, the issuing of a policy of insurance was expressly held not to be a transaction of commerce, and, therefore, not excluded from the control of State laws, and the decision in that case is predicated upon that distinction. It is, therefore, not inconsistent with these views."

In view of this case one can hardly say with certainty that when the question shall arise for decision by the Supreme Court of the United States the ruling of a majority of the members will be to

the same effect as that of Mr. Justice MATTHEWS and Mr. Justice BLATCHFORD in the opinion just quoted, but for reasons already given such would seem to be the only logical outcome of the cases we have reviewed. The views expressed by the Justices mentioned have been followed in Ware *v.* Hamilton-Brown Shoe Co. (S. C., Ala.), 9 So. Rep., 136; Mfg. Co. *v.* Hardie (N. M.), 16 Pac. Rep., 136.

DOES A SINGLE TRANSACTION CONSTITUTE DOING BUSINESS WITHIN THE MEANING OF SUCH STATUTES?—While the wording of the statutes in the different States varies somewhat, and the difference in wording may affect the determination of this question, roughly speaking an affirmative answer has been given in the following cases: *In re* Comstock, 3 Sawy., 218; Bank *v.* Page, 6 Ore., 431; Thorne *v.* Ins. Co., 80 Pa., 15 (compare Campbell Co. *v.* Hering, 139 Pa., 473); Roche *v.* Ladd., 1 Allen, 441; Ins. Co. *v.* Slaughter, 20 Ind., 520; Ins. Co. *v.* Pursell, 10 Allen, 231; Cincinnati H. & M. Ins. Co. *v.* Rosenthal, 55 Ill., 85; Ins. Co. *v.* Harvey, 11 Wis., 412; Farrior *v.* New England Mottgage Security Co., 88 Ala., 275.

While the contrary has been held in Potter *v.* Bank, 5 Hill, 491; Graham *v.* Hendricks, 22 La. Ann., 523; Suydam *v.* Morris C. & B. Co., 6 Hell., 217; Nav. Co. *v.* Weed, 17 Barb., 378; Gilchrist *v.* Helena H. S. & R. Co., 47 F., 593; Colorado Rwy. Works *v.* Sierra Grande Mining Co., 15 Colo., 499; Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.

EFFECT OF NON-COMPLIANCE WITH SAID LAWS.—In some of the States all contracts made by foreign corporations, before complying with the conditions imposed by the statutes of the States in which the contracts are made, are held to be void. And this even where the statutes do not expressly so provide, on the ground that whenever an act is made subject to a penalty by a statute it is considered as prohibited and void: Ins. Co. *v.* Slaughter, 20 Ind., 520; Cincinnati M. H. A. Co. *v.* Rosenthal, 55 Ill., 85; Ins. Co. *v.* Pursell, 10 Allen, 232; Roche *v.* Ladd, 1 Allen, 441; Thorne *v.* Ins. Co., 80 Pa., 15; Bank *v.* Page, 6 Oreg., 431; *In re* Comstock, 3 Sawy., 218; Semple *v.* Bank British Columbia, 5 Sawy., 88.

On the other hand, it has been held that where a penalty is prescribed for failure to comply with the requirements of such statute the contracts of a foreign corporation which has not complied therewith are not void, as the penalty prescribed is exclusive of all other: Ehrman *v.* Teutonia Ins. Co., 1 McCrary, 123; Columbus Ins. Co., *v.* Walsh, 18 Mo., 229; Clark *v.* Middleton, 19 Mo., 53; Brooklyn Life Ins. Co. *v.* Bledore, 52 Ala., 538; Union Mut. Life Ins. Co. *v.* McMillan, 24 Ohio St., 67; King *v.* National M. & E. Co., 4 Mo., 1; Lumber Co. *v.* Thomas, 33 West Va., 566.

But even though the contract thus made may be void, so that an action based upon it could not be maintained, yet suit without reference to the contract may be had for benefits conferred: Morawetz on Corporations, 2d ed., § 721, and cases there cited; Brice Ultra Vires, 2d ed., 796; Holmes *v.* Barnard, 15 W. N. C. (Pa.), 110; Thorne *v.* Travellers' Ins. Co., 80 Pa., 15.

And it does not follow that because such contract is treated as void in the State where it was made

that it will necessarily be so regarded in the courts of other States: Eureka Ins. Co. *v.* Parks, 1 Cin. Super. Ct., 574.

A foreign corporation may not, however, take advantage of its own non-compliance with such statutes, and suit may be brought against it notwithstanding such default. Hagerman *v.* Empire Slate Co., 97 Pa., 534.

It has also been held that where a foreign corporation has failed to comply with such statutes any one attempting to act as its officer or agent is personally liable on contracts made by him in behalf of the corporation, though no such penalty is provided by statute: Lasher *v.* Stimson, 1 Adv. Rep. (S. C. of Pa.), 208.

THE PROPER CONSTRUCTION OF SUCH STATUTES.

A review of the decisions has led the writer to the conclusion that the construction put upon these statutes by the courts of the various States has often been arbitrary and without due consideration of the consequences which follow therefrom.

As has been pointed out by Mr. MORAWETZ in his admirable work on Private Corporations, the primary object of such statutes is to protect parties dealing with these companies from imposition and to secure jurisdiction over them in the local courts, not to render the contracts and dealings of corporations which have not complied with their provisions void and unenforceable. Where the statute does not declare that such a result shall follow from such omission, it ought not to be inferred by the courts. The same principles which have been applied in determining the effect of acts of corporations in excess of their chartered powers should govern in deciding the status of contracts made by corporations which have failed to comply with the provisions of such statutes.

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POST PUBLISHING CO. *v.* MOLONEY.[1] SUPREME COURT OF OHIO.

Libel—Privileged Communication—Criticism of Public Officer.

It is libelous *per se* to print and publish of a person that he "is said to have been in the workhouse, and to have had a criminal record;" and

[1] Reported in 33 N. E. Rep., 921.